SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 1075

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SAMUEL J. KATZBERG, LOUIS HAIG AND JACOB F. SCHMITT,

*Petitioners,*

*vs.*

THE UNITED STATES

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## PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Opinion Below.

The opinion of the Court of Claims is reported in Case No. 45,289, March 3rd, 1941 (91 Ct. Cls. — ). A certified copy of the decision may be found at R. 5.

### (A) The Statutory Provision Believed to Sustain Jurisdiction to Review the Judgment.

The statutory provision believed to sustain jurisdiction to review the judgment is Sec. 3 (b) of the Act of February 13, 1925; 43 Stat. 939.

### (B) The Date of the Judgment Sought to Be Reviewed.

The judgment sought to be reviewed was entered in the office of the Clerk of the Court of Claims on March 3rd, 1941 (R. 6).

### (C) The Statute Involved.

The statute involved is Section 1242 of Title 26 of the U. S. Code; Section 3463 Revised Statutes, and Internal Revenue Regulation No. 99-5th Revision (Department Circular No. 147 of 1899).

The regulation has the force of law. (*Ex parte Reed*, 100 U. S. 13; *U. S.* v. *Moorehead*, 243 U. S. 607).

### (D) Statement of the Case.

The petitioners seek the review of a judgment of the Court of Claims of the United States entered on March 3rd, 1941, sustaining a demurrer to the petition of petitioners in the Court below on the ground that the petition did not state facts furnishing any ground of relief against the United States. A detailed statement of the facts upon which the cause of action is founded, is contained in the petition which may be found in the record (R. 2-4).

## ARGUMENT.

### I.

### The Contract Alleged in the Petition Was Not Void for Want of Definiteness.

The validity of petitioners' cause of action has been challenged by the Attorney General upon the ground that the defendant has not by the terms of the offer obligated itself to pay any award; that there was no mutuality in the contract; and that even if it be assumed that there was mutuality, the definiteness and certainty requisite for a contract are lacking because no fixed amount was stated in the offer of reward.

(a) The contract formed by an offer of a reward and its acceptance, is the promise by the offerer given on the one side and performance by the offeree on the other. This

rule of law is so well settled that citation of authorities would constitute supererogation.

> "The general rules governing the interpretation or construction of contracts apply to rewards. As the contract depends wholly upon the offer and its acceptance by performance, its legal import and effect must be determined by the terms of the offer, fairly, liberally and reasonably construed according to the intention of the offerer as manifested in the offer itself in the light of surrounding circumstances" (54 C. J. 783, Sec. 18).
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> "Statutes offering rewards are ordinarily liberally construed so as to effectuate their purpose" (54 C. J. 783, Sec. 20).

(b) The contract was definite and certain in that it offered to pay "such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10% of the net amount of fines * * * recovered by suit or otherwise, etc." It meant that a reward would be paid, and fixed 10% as the ceiling. It was not vague or indefinite that an award would be paid, nor do the words "as the Commissioner of Internal Revenue may deem suitable" condemn the contract, nor does the failure to set up a fixed amount in the offer affect its validity. However, even if the provision for compensation in the circular letter is indefinite and uncertain, it by no means follows that a recovery may not be had.

The statute conferred the power to offer a reward to informers without specifying the amount. It is entitled "Expenses of Detection and Punishment of Frauds", and authorizes the Commissioner, with the approval of the Secretary of the Treasury, to pay such sums, "not exceeding the sum appropriated therefor", as he may deem necessary for detecting or bringing to trial persons guilty of violating the internal revenue laws or conniving at the same.

On March 15, 1934, Congress made an appropriation for the year ending June 30, 1935, for the Bureau of Internal

Revenue, which appropriation included $100,000 to be disbursed in the District of Columbia to pay for "detecting and bringing to trial persons guilty of violating the Internal Revenue laws, including payments for information leading to the detection of such violators". (Ch. 70, Acts of Congress March 15, 1934, pages 430-1). Thus Congress appropriated the money to pay the award, and all that the Commissioner had to do was to make it certain and definite by fixing the amount.

We respectfully submit that if the contention of the defendant is sound that the offer embraced in the circular letter is indefinite and uncertain in failing to state the amount to be paid, then the petitioners are entitled to recover the fair and reasonable value of their services, since the defendant has accepted the benefit of petitioners' performance.

The offer, even if indefinite as to the exact compensation, contained an implied promise that if the defendant accepted petitioners' services the Commissioner in good faith would make an honest estimate of a suitable reward. This the Commissioner failed to do, but arbitrarily rejected the claim without a hearing.

Let us assume for the sake of argument that the offer fixed no percentage or any amount that the Commissioner "might deem suitable". Such an offer necessarily carried with it am implied promise that if petitioners rendered services in response to the offer, and the services were accepted by the defendant and were beneficial to it, that the Commissioner would in good faith make an honest and reasonable estimate of the amount of the reward that would be suitable under the circumstances.

In discussing the doctrine of implied promises, Cardozo, J., in *Wood* v. *Duff-Gordon,* 222 N. Y. 88, at p. 90, said:

> "It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We

> think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation', imperfectly expressed."

In *Butler* v. *Winona Mill Co.*, 28 Minn. 205, 9 N. W. 697, the defendant employer reserved the right to pay plaintiff such wages as it considered "right and proper". The Court said that under those circumstances the defendant was under a duty "to determine and fix the amount of the compensation honestly and in good faith".

In *Tennant* v. *Fawcett* (Tex. Civ. App.) 55 S. W. 611, the defendant had reserved the right to fix the fees of the plaintiff. The court said that the defendant was obligated to fix a fair and reasonable fee.

In *Von Reitzenstein* v. *Tomlinson,* 249 N. Y. 60, cited in the court below by the defendant, it was held that a contract calling for "an appropriate percentage of the profits" was void for indefiniteness, but the court nevertheless said at page 67:

> "The plaintiff should be paid for his work according to the standard of the market, or, in the absence of such a standard, according to such fair approach thereto as may be found to be attainable."

See also *Bryant* v. *Flight,* 5 M. & W. 114.

In the case at bar defendant has arbitrarily rejected petitioners' claim and has refused to determine and fix a suitable reward for them. Under such circumstances we submit that petitioners are entitled to recover the reasonable value of their services.

We submit that after petitioners had performed, defendant may not defeat their right to compensation by arbitrarily refusing to exercise an honest judgment in fixing a suit-

able reward. If the Commissioner was guilty of such arbitrary conduct, and the demurrer admits that he was, then the law will impose an obligation, implied in fact, to pay the reasonable value of petitioners' services. This duty of reasonable conduct, so as not to defeat recovery, is not unusual in the law. Thus a promise to pay for performance which is "satisfactory to the promissor" has been uniformly held to imply a duty to examine the performance and give fair and honest consideration to the matter. The law will not tolerate arbitrary rejection as the means of avoiding liability.

*III, Williston on Contracts,* 1937 Revised Ed. Sec. 675-A;
*Restatement of the Law of Contracts,* Secs. 265, 794.

It is one thing to hold invalid an executory contract by reason of the indefiniteness of the promise. It is another to disclaim liability for services performed on the ground of indefiniteness of the compensation, where if the promissor had acted in good faith and exercised an honest judgment such indefiniteness would have been removed. Defendant by its arbitrary refusal to act may not defeat petitioners' right to recovery.

## II.

**Even if the Contract is Too Indefinite for Enforcement Because it is Lacking in the Amount to be Paid, Petitioners are Entitled to Recover Upon a Quantum Meruit.**

This principle is well settled in the law.
*N. Y. C. & H. R. R. Co.* v. *Gray,* 239 U. S. 583 at p. 587;
*Winton* v. *Amos,* 255 U. S. 373 at p. 392;
*Plattenberg* v. *Briggs,* 166 App. Div. (N. Y.) 326;
*Winch* v. *Warner,* 186 App. Div. (N. Y.) 710;
*Bluemner* v. *Garvin,* 120 App. Div. (N. Y.) 29.

In *Winton* v. *Amos,* 255 U. S. 373, which was an appeal from the Court of Claims, this Court said at p. 392:

> "The fact that in the present case the services were rendered under contract with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither malum in se nor mala prohibita, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay the reasonable value."

III.

**The Matter of Payment of Rewards to Informers Does Not Lie in the Favor of the Government, But is Compensation for Value of Services Rendered.**

As was said by the Comptroller General (Vol. 5, Dec. Compt. Gen. 665):

> "Payment for information so furnished as to violations of the Customs laws are not personal gratuities, but are rather in the nature of compensation for services rendered and have a direct relation to the benefit derived from such information by the United States. * * * The compensation having been earned by furnishing information resulting in a recovery, the right to file a claim therefor becomes vested in the informer."

And in 26 Dec. Compt. of the Treasury 531, at page 532, the Comptroller General said:

> "The purpose of the law is to encourage by appropriate reward persons not in the Federal service to assist the Government in the detection and suppression of fraud upon the Customs revenue * * *."

And in 3 Dec. Compt. Gen. 499, the syllabus of the decision of the Comptroller General is as follows:

> "An informer who furnishes the first information resulting in the recovery of taxes unlawfully withheld is entitled under Sec. 3463, Revised Statutes, and the

Act of Mar. 3, 1921 (41 Stat. 1274) to a reasonable reward approved by the Secretary of the Treasury and not exceeding 10% of the amount recovered."

IV.

**The Court of Claims Has Jurisdiction of a Contract Implied in Fact, and it is Immaterial that the Petition Did Not Proceed on the Theory of a Quantum Meruit.**

Jurisdiction of the Court of Claims:

(a) The court below has jurisdiction of an action on contract, express or implied, or for damages liquidated or unliquidated, in cases not sounding in tort.

Act of Congress March 3, 1887, Ch. 399, Sec. 1; 24 Stat. 505;

Act of Congress March 3, 1911, Ch. 231, Sec. 145; 36 Stat. 1136.

(b) It is no objection that the petition proceeded upon the theory of fixed damages. The petitioners are entitled to recover upon a *quantum meruit* if they cannot prove fixed damages.

In *Sussdorf* v. *Schmidt*, 55 N. Y. 319, at p. 324, the court held that upon a complaint to recover alleged agreed compensation for services, a recovery upon proof of, and for the value of the services, is sustainable. At most it is a variance between the pleadings which may be disregarded unless it appears that the defendant has been misled.

See also

*Phoenix Security Company* v. *Dittmar*, 224 Fed. (C. C. A.) 892, at p. 893;

*Chesapeake & Ohio R. R. Co.* v. *Knapp*, 34 U. S. (9 Pet.) 541, at p. 565;

*Lockhart* v. *Hamlin*, 190 N. Y. 132, at p. 137;

*Rubin* v. *Cohen*, 129 App. Div. (N. Y.) 395;

*Shirk* v. *Brookfield*, 77 App. Div. (N. Y.) 295.

A variance between the pleading and the proof which does not mislead or surprise is unavailing.

*Erie R. R. Co.* v. *Kennedy,* 191 Fed. 332, 112 C. C. A. 76;

*Waters* v. *Guile,* 234 Fed. 532, 148 C. C. A. 298.

V.

**The Petition Below Sets Forth Sufficient Grounds Entitling the Petitioners to Relief Against the Defendant.**

The argument was made in the court below by the Attorney General that in no event can the petitioners recover because the information furnished by them was not original information; that since the information had first been furnished to a customs officer at the Port of New York, the information became the property of the defendant and the petitioners could not recover. However, the petition alleges (R. 2), that on November 27, 1934, the petitioners gave original information of frauds upon the customs to a customs officer at the Port of New York, and at the same time to the Secretary of the Treasury. The petition also alleges that at petitioners' request and in the due course of his procedure, the customs officer at the same time notified the Internal Revenue office of the frauds perpetrated by the importers, with the view of investigating possible frauds of said importers upon the Internal Revenue laws of the defendant, and detecting and bringing to trial and punishment persons guilty of violating or conniving at the same (R. 2); and that in January, 1935, petitioners advised the customs officer as well as the Intelligence Bureau of the Collector of Internal Revenue, that the importers had covered up their frauds upon the customs by committing frauds upon the internal revenue, and specifically referred to the returns of the importers for the years 1932 to 1934 (R. 2-3).

Thus it appears that the information was not only given

to a customs officer on November 27, 1934, with a request that he pass the information on to the Internal Revenue office, but also to the Collector of Internal Revenue in January 1935.

The argument that the information became the property of the Government when first made to the customs officer and therefore cannot form the basis of a claim for reward for information respecting internal revenue frauds, is without any basis. The Customs Service and the Internal Revenue Service are not separate branches of separate governments; both are tax collection agencies of the same government, one collecting customs duties, and the other income and death taxes, and other revenues.

In a somewhat similar case the Comptroller General ruled that an informer who gave information to an officer of the U. S. Drug Inspection Service was entitled to a reward for first information under Sec. 4 of the Act of 1874, where that officer communicated the information to the Drug Inspection Service.

> "If the initial step leading to a recovery is taken by a chief officer of the Customs as a result of information communicated to him through the chief officer of another branch of the Government service, I see no reason why the original informer should not receive the compensation authorized, provided the circumstances under which the original information was furnished were such as to justify an award.
>
> "The purpose of the law is to encourage * * * persons * * * to assist the Government in the detection and suppression of fraud upon the customs revenue, and to withhold the reward in a meritorious case merely because the information was not furnished directly to the proper officer would tend to defeat rather than promote that purpose." (Vol. 26, Dec. Compt. of the Treasury 531, at p. 532.)

For the purposes of the demurrer the allegations of the petition must be taken as true, and from them it appears that not only was the information given by the plaintiffs to the Customs officer, but also to the Intelligence Bureau of the Collector of Internal Revenue (R. 2-3).

The Secretary of the Treasury allowed, and in large part paid, a claim by the petitioners for reward for the customs information, and there can be no objection to their recovering a reward for the internal revenue information. There is nothing in either Section 619 of the Tariff Act of 1930, or in Section 3463 of the Revised Statutes, precluding the informer from earning a reward for both, if the information as to each was original.

It is respectfully submitted that the writ should be allowed as prayed for.

DAVID STECKLER,
*Attorney for Petitioners,*
*25 West 44th Street,*
*New York City, N. Y.*

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